UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 28 (CERES GULF, INC.)

and **Cases 16-CB-181716 and 16-CB-194603**

DONNA MARIE MATA, an individual

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION LOCAL 28's RESPONSE BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS AND SUPPORTING BRIEF

Respectfully submitted,

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OF COUNSEL FOR RESPONDENT

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Abbreviation Key

The April 10-11, 2018 Hearing Transcript is referred to as Tr. p.#, l.#.

The General Counsel's Exhibits are referred to as GC Ex. #.

International Longshoremen's Association Local 28's (Respondent) Exhibits are referred to as Resp. Ex. #.

The Administrative Law Judge's Decision is referred to as ALJ Decision.

When specific page or paragraph numbers within exhibits are referred to, they are designated p. # or ¶ # respectively.

TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

The General Counsel presents sixteen exceptions to the Administrative Law Judge's ("ALJ") Decision.[1] The Exceptions are grouped as follows: five pertain to credibility determinations (Exceptions 1, 2, 3, 4, and 16); nine arise from evidentiary conclusions (Exceptions 5, 6, 7, 8, 9, 11, 12, 14, and 15); and two address legal issues (Exceptions 10 and 13). Missing from the Exceptions is any overarching exception to the ALJ's conclusions dismissing Dona Mata's ("Mata") claims.

Rather than argue whether a forest exists, the General Counsel argues about what species of trees comprise the forest. At the end of the day, the forest will still stand. Regardless of whether an isolated exception is upheld, the ALJ's decision will stand because it results from her review of the evidence in its entirety rather than her determinations on specific aspects of that evidence.

I.

Summary of the Argument

This matter has been heard twice. It was originally brought with two claims. First, it was claimed that International Longshoreman's Association Local 28 ("Local 28") breached its duty of fair representation by discriminating against Mata by denying her training opportunities through West Gulf Maritime Association ("WGMA") on the basis of Mata's gender. Second, it was claimed that Local 28 attempted to coerce Mata into dropping her discrimination charge against Local 28. The matter was originally tried on April 2 and 4, 2017. After a decision adverse to the General Counsel, the matter was

[1] GC Exceptions.

remanded for a new hearing as the result of a claim by the General Counsel that the ALJ's adverse decision resulted from gender bias.

On the second hearing, presenting the same claims as the first, a decision adverse to the General Counsel was again reached. The General Counsel excepted to the decision resulting in this proceeding.

In this proceeding, the General Counsel abandons the claim of coercion. However, the General Counsel raises for first time, a claim that Local 28's training referral process is arbitrary. The General Counsel maintains a claim that Mata was discriminated against Mata but expands it to claim that Local 28 has a general bias against women.

The General Counsel's Exceptions should be denied for several reasons.

First, the ALJ's credibility determinations should not be rejected. The credibility decisions were based, as they should be, on the entirety of the credible and relevant evidence. In addition, the ALJ was afforded the opportunity to adjudge the witnesses demeanor, veracity, and analysis of evidence supporting or countering testimony. Finally, the credibility exceptions, even if accepted, would not lead to a differing judgment.

Second, the raising of a new claim that the training referral system should be rejected because it violates Local 28's due process rights to raise it for the first time in Exceptions. Further, the evidence establishes that the training referral system is neither generally arbitrary nor was it arbitrarily followed as to Mata.

Third, the ALJ utilized the *Wright Line* analysis requiring the showing that gender was a motivating factor in Local 28's conduct. The General Counsel fails to show that gender was a motivating factor in any conduct by Local 28. The General Counsel fails to demonstrate any nexus between the alleged conduct by Local 28 and the alleged denial of

training opportunities afforded Mata. Finally, the General Counsel's statistical analysis argument is incomplete, flawed, and fails to evidence gender bias.

Because the General Counsel failed to address its exceptions in an organized fashion, instead addressing them within topics, Local 28 follows suit. Local 28 objects to each of the sixteen Exceptions urged by the General Counsel.

II.

The Administrative Law Judge's Dismissal of Case Number 16-CB-194603 is Not Excepted to and Must be Upheld

On March 8, 2017 the National Labor Relations Board ("NLRB") notified Local 28 of a new charge against it.[2] This charge was consolidated with a pre-existing Complaint on March 22, 2017.[3] The new charge was assigned Case Number 16-CB-194603. The charge allegation was stated in the Complaint as:

> 11.
>
> Since about December 1, 2016, Respondent, by J.P. San Miguel, Jr., solicited the Charging Party to withdraw her unfair labor practice charge in Case 16-CB-181716.[4]

This claim was ordered dismissed by the ALJ.[5]

The General Counsel failed to except to any portion of this decision or dismissal. Under NLRB regulations, any exception that is not specifically urged is deemed to be waived.[6] As a result, the dismissal of Case Number 16-194603 must be upheld.

[2] GC Ex. 1(f).
[3] GC Ex. 1(h).
[4] GC Ex. 1(h) ¶ 11.
[5] ALJ Decision pp. 16-19.
[6] 29 C.F.R. § 102.46(a)(1)(ii).

III.

The General Counsel's Credibility Exceptions are Inadequate, Not Determinative, Unsupported, and Misdirected

The General Counsel must establish its claims by a preponderance of the credible evidence.[7] The NLRB will not overrule an ALJ's credibility determination unless "the clear preponderance of all of the relevant evidence convinces" the panel that the judgment is incorrect.[8] While the General Counsel takes issue with credibility determinations by the ALJ in isolation, it fails to demonstrate that the ALJ's credibility determination should be ignored under this standard.

The General Counsel's credibility exceptions seek to exchange the ALJ's credibility determinations with the General Counsel's opinions. The ALJ detailed the framework of her credibility analysis in footnote 1 of her Decision.[9] The ALJ extensively presented her credibility analysis.[10] The ALJ's determinations were based on her analysis of the entire evidence presented and should not be disturbed.

The ALJ found portions of Mata's testimony "misleading," "not accurate," contradictory, "not exactly forthcoming," "inherently improbable," and "confused."[11] At one point, the ALJ noted, "[Mata] had so many issues that I cannot see clear to credit her fully."[12]

The ALJ also found Jessie San Miguel, Jr. ("San Miguel, Jr.) and Tim Harris ("Harris") to lack credibility at times.[13] One of the topics Harris was not found credible

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[7] 22 C.F.R. § 1423.18; *Aerospace Industrial Dist. Lodge 751*, 270 N.L.R.B. 1059 (1984).
[8] *Inova Health Sys. v. N.L.R.B.*, 795 F.3d 68, 74 (D.C. Cir. 2015) (quoting *Standard Dry Wall Prods., Inc.*, 91 N.L.R.B. 544, 545 (1950)), enfg. 360 NLRB 1223 (2014).
[9] ALJ Decision p. 2, note 1.
[10] ALJ Decision p. 12-14.
[11] ALJ Decision p. 13.
[12] ALJ Decision p. 13.
[13] ALJ Decision p. 13.

on was Mata's allegations of propositioning.[14] Yet, even though the ALJ gave "the General Counsel the benefit of the doubt about Harris likely engaging in unwanted touching," the General Counsel excepts that this determination was not "explicit."[15] The General Counsel fails to demonstrate how failing to explicitly make this determination impacted the ALJ's finding that "insufficient intent to discriminate and deny training upon this reason based upon the credible evidence" was incorrect.[16] Given that the ALJ took Harris' alleged conduct under consideration when making the determination, whether it was explicitly or inexplicitly credited had no impact on the determination. This serves as but one example of the General Counsel's failure to demonstrate how any excepted to credibility determinations led to an incorrect judgment.

IV.

Factual Background

Mata was dispatched for work through Local 28 approximately 60 times between March 10 and November 9, 2007.[17] At the time, Mata was certified through Local 28 in Yard Tractor and Forklift, obtaining these certifications on April 1, 2007.[18] Powered Industrial Truck ("PIT") certifications lasted for three years.[19] Thus, these certifications expired on April 1, 2010.[20] Between November 2007 and November 2010, Mata was employed in Iraq.[21] Mata testified that every four months she returned from Iraq for 10 days, 10 days, and 14 days respectively.[22] The General Counsel represents that Mata

[14] ALJ Decision p. 13.
[15] ALJ Decision p. 15; GC Exception 3.
[16] ALJ Decision p. 15.
[17] Resp. Ex. 7.
[18] Tr. p. 116, l. 19-21; Resp. Ex. 2.
[19] Tr. p. 423, l. 17-p. 424, l. 4.
[20] Resp. Ex. 2; TR p. 423, l. 1-21.
[21] Tr. p. 98, l. 18-p. 99, l. 1.
[22] Tr. p. 99, l. 6-18.

"returned from Iraq about every four months for ten-to-fourteen **week** stretches."[23] Presumably, despite the obvious difference between days and weeks and the differing implications the difference results in, this is merely a typographical error by the General Counsel.

During these periods, Mata claims she "was going to ILA Local 28 on those days to see if I needed any certifications or the certifications that I had, and get a job on those days that I was there."[24] While initially testifying she went Local 28 each day she was back from Iraq, Mata modified this when asked if she suffered from jet lag on her return.[25] Mata claimed to have requested Local 28 arrange for her to attend classes so she could work on her next return.[26] However, throughout this period, Mata retained her physical qualification and trained worker certification.[27] Mata maintained her certifications in Yard Tractor and Forklift until April 1, 2010.[28] On January 1, 2008 Mata's Lashing certification was completed and on April 1, 2010 she obtained her Hazmat certification.[29] Thus, despite Mata's claims that she was denied certification during this period, she did not require recertification for much of it and obtained certification during it.

On the conclusion of her Iraq employment, Mata claims she again approached Local 28 in an effort to obtain employment. However, Mata accepted employment with a private trucking entity soon after her return.[30] Mata was employed by this entity by the end of 2010.[31] Mata maintained employment with private trucking entities through

[23] GC Brief p. 9 (emphasis added).
[24] Tr. p. 28, l. 21-p. 29, l. 1.
[25] Tr. p. 256, l. 10-16; Tr. p. 256, l. 17-19.
[26] Tr. p. 114, l. 8-14.
[27] Resp. Ex. 2.
[28] Resp. Ex. 2.
[29] Resp. Ex. 2.
[30] Tr. p. 101, l. 14-17.
[31] Tr. p. 102, l. 9-13.

March 2015.[32] During that period, Mata did not work due to injury from December 2011 to the beginning of 2013.[33] Mata testified that occasionally, "every couple of months," she went to ILA Local 28 in an effort to obtain work.[34] Typically, Mata would go to Local 28 only one day and, at times, two days consecutively.[35] Mata concedes her efforts were "sporadic" between her return from Iraq and March 2015."[36] It was not until April to May 2015 that Mata made herself available for employment through Local 28 on a regular basis.[37] Mata's first day of employment through Local 28 in 2015 was May 14.[38] Mata obtained job certifications in June and July 2015.[39]

Given Mata's sporadic presence at Local 28 between 2007 and 2015, it would have been virtually impossible to place her in training classes because the process typically takes a month to complete.[40] This is supported by the fact that once Mata began attending Local 28 regularly in April or May 2015, she obtained employment and training classes in short order.[41]

Mata's claim that she was denied training, whether based on gender or generally is countered by the facts. When Mata initially returned regularly to Local 28, she quickly obtained her basic training classes.[42] While the Yard Tractor class was full, Mata successfully attended the class as a stand-by.[43] Harris submitted his lists on June 3,

[32] Tr. p. 104, l. 2-23.
[33] Tr. p. 105, l. 23-p. 106, l. 2.
[34] Tr. p. 109, l. 8-19.
[35] Tr. p. 109, l. 21-p. 110, l. 2.
[36] Tr. p. 110, l. 3-6.
[37] Tr. p. 135, l. 4-18.
[38] Tr. p. 133, l. 23-p. 134, l. 1.
[39] Resp. Ex. 2.
[40] Tr. p. 345, l. 3-p. 346, l. 22.
[41] Tr. p. 136, l. 15-21; Tr. p. 139, l. 6-22; Tr. p. 136, l. 23-p. 124, l. 4; Tr. p. 139, l. 6-22; Resp. Ex. 2.
[42] Tr. p. 348, l. 22-p. 349, l. 8; Resp. Ex. 2.
[43] Tr. p. 349, l. 4-8; Resp. Ex. 12 (p. 3-4).

2015.[44] The Yard Tractor class was scheduled on June 11, 2015.[45] Harris sent an e-mail requesting stand-by status for that class for Mata on June 5, 2015.[46] Harris recalls only a few times Mata sought him out for training placement.[47] One such event occurred after the October 2015 membership meeting on October 7, 2015.[48] By the evening of October 7, 2015, all but the 7:30 a.m. and 1:00 p.m. October 8, 2015 Heavy Lift and Top Loader classes had already occurred.[49] Harris told Mata the classes were capped by that point and she should approach him for the next month.[50] Harris does not recall Mata doing so.[51] On another occasion Mata inquired the day of a class and was told she could try to attend by stand-by as she had in June 2015.[52]

V.

Interjection of the New Theory that Local 28's Training Referral Process was Arbitrary through Exceptions Violates Due Process and is Not Permitted

On initial review of this matter, the NRLB succinctly stated the allegations at issue, stating:

> The complaint alleges that the Respondent violated its duty of fair representation to Charging Party Donna Mata in violation of Section 8(b)(1)(A) of the Act by: (1) refusing to refer Mata for training based on her sex; and (2) soliciting her to withdraw her unfair labor practice charge.[53]

Absent was any allegation that Local 28 maintained an arbitrary "system of administering training."[54] On this second review, the General Counsel interjects this new claim, hoping

[44] Resp. Ex. 13; Tr. p. 364, l. 22-p. 365, l. 2.
[45] Resp. Ex. 13.
[46] Resp. Ex. 13.
[47] Tr. p. 413, l. 22-p. 414, l. 9.
[48] Tr. p. 355, l. 8-p. 356, l. 4.
[49] Resp. Ex. 18.
[50] Tr. p. 356, l. 5-11.
[51] Tr. p. 360, l. 11-15.
[52] Tr. p. 356, l. 12-p. 357, l. 2.
[53] *International Longshoreman's Association Local 28*, 366 NLRB No. 20, slip op. at 1 (2018).
[54] GC Exceptions 8, 9; GC Brief pp. 20-22.

it will be addressed even though the General Counsel failed to assert it in its Complaint and did not urge it at hearing of this matter.

The General Counsel glosses over its omission by quoting boilerplate from its Complaint stating "Respondent has failed to represent the Charging Party for reasons that are arbitrary, discriminatory or in bad faith …"[55] The General Counsel immediately follows this with the conclusory statement, "Thus, included in the Complaint allegations is the theory that Respondent's conduct was arbitrary."[56] The General Counsel then asserts "The arbitrary prong of the duty of fair representation does not hinge on motivation."[57] The General Counsel's surgical and conclusory description of its Complaint is purposeful.

The General Counsel cites three paragraphs of its Complaint. They state:

> 9.
>
> From about March 1, 2016 to about August 1, 2016, Respondent prohibited the Charging Party from being added to certification training lists.
>
> 10.
>
> From about March 1, 2016 to about August 1, 2016, Respondent prohibited the Charging Party from receiving certification training.
>
> 13.
>
> By the conduct described above in paragraphs 9 and 10, in connection with its representative status described above in paragraph 7, Respondent has failed to represent the Charging Party for reasons that are arbitrary, discriminatory, or in bad faith and has breached the fiduciary duty it owes to the Charging Party.[58]

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[55] GC Brief p. 18.
[56] GC Brief p. 18.
[57] GC Brief p. 19.
[58] GC Brief p. 18; GC Ex. 1(h) (¶¶ 9, 10, & 13). During the initial hearing of this matter in April 2017, the Complaint was amended as follows:

> Ms. Duggan: Yes, the General Counsel moves to amend the Consolidated Complaint to change Paragraphs 9 and 10. Instead of saying since about March 1, 2016 in both paragraphs, it should be - - it should be amended to "from about March 1st, 2016 to about August 1, 2016." (April 4, 2017 Tr. p. 170, l. 19-23).

The General Counsel omits these paragraphs:

> 12.
>
> Respondent engaged in the conduct described above in paragraphs 9 and 10 because of the Charging Party's gender.
>
> 14.
>
> By the conduct described above in paragraphs 9, 10, and 11, Respondent has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.
>
> 16.
>
> To fully remedy the unfair labor practices set forth above, the General Counsel seeks an order requiring Donna Mata be made whole, including reasonable consequential damages incurred as a result of Respondent's unlawful conduct.[59]

Other than an April 4, 2017 amendment referenced in **footnote**, no other amendment was made to the Complaint. It should have been obvious to the General Counsel that its Complaint and its allegations are explicitly based on **gender** specifically and alone. There is no general "theory that Respondent's conduct was arbitrary" raised. This is underscored by the fact that no remedy for an alleged arbitrary "system of administering training" was sought.[60] Moreover, even in its opening remarks at the hearing of this matter, the General Counsel failed to assert an allegation that the "system of administering training" was arbitrary.[61]

Following the Complaint, the ALJ properly recognized the General Counsel's claims were based on the "invidious reason of gender."[62] The General Counsel excepts to

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> Judge Ringler: So I will permit the amendment to the Complaint, so the complaint is so amended with regard to paragraphs 9 and 10. (April 4, 2017 Tr. p. 171, l. 25-p. 172, l. 2).

[59] GC Ex. 1(h) (¶¶ 12, 14, & 16). Paragraph 11 relates to a claim which was rejected by the ALJ to which the General Counsel presents no Exception to. Paragraph 15 asserts only that the alleged unlawful conduct affects commerce within the meaning of the Act.

[60] GC Ex. 1(h) (¶ 14).

[61] Tr. pp. 13-15.

[62] ALJ Decision p. 2 (l. 21-29).

this, complaining "The judge failed to address whether, regardless of motivation, the training system itself and its application to Mata was arbitrary (Exception 8)."[63] The General Counsel accuses the ALJ of ignoring evidence and arguments.[64] This is untrue.

As the ALJ stated, "General Counsel puts forth two theories. The Union's actions were based upon invidious reasons; and The Union's actions are based upon discriminatory treatment."[65] Following the Complaint and the theories actually put forth, the ALJ observed that "Sex has long been held as an irrelevant, invidious, and unfair consideration in operation of a hiring hall."[66] The ALJ recognized:

> General Counsel suggests the Union had two issues of sexual discrimination as the basis for denying Mata training opportunities: First, the Union discriminates against women in general; secondly Mata spurned Harris' unwanted advances, which caused him to deny her training opportunities."[67]

If there is a conclusion to be reached as a result of the ALJ's ignoring a theory that the "system of administering training" itself is arbitrary, it is simply that such a theory was not presented to be ignored.

The General Counsel's effort to interject a new theory at this stage is contrary to law. A finding on a theory first raised in exceptions "would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it."[68] Due process requires an administrative agency "give the party charged a clear statement of the theory on which the agency will proceed with the case."[69]

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[63] GC Brief p. 15.
[64] GC Brief p. 20.
[65] ALJ Decision p. 14 (l. 13-14).
[66] ALJ Decision p. 14, (l. 25-27) (citation omitted).
[67] ALJ Decision p. 14 (l. 34-37).
[68] *Lamar Central Outdoor*, 343 N.L.R.B. 261, 265 (2004) (rejecting expanded theory argued for the first time in exceptions).
[69] *Id.*

An agency may not change theories in midstream without providing the party charged reasonable notice of the change.[70] The General Counsel's effort to salvage its case by interjecting a new theory through exceptions is not permissible.[71]

VI.

The Local 29 Training Referral Process is not Arbitrary

Even if failure to assert the new theory and Local 28's due process rights are ignored, it does not provide the General Counsel an avenue for overcoming yet another decision adverse to it.[72]

In analyzing how longshoreman obtain training, the process should be accurately and fully described.

> The West Gulf Maritime Association negotiates and administers various multiemployer collective bargaining agreements with the International Longshoreman's Association (ILA) in ports located on the western shores of the Gulf of Mexico. **As part of this administration, the West Gulf Maritime Association coordinates training on waterfront safety and policies, coordinates hands-on training on equipment, issues equipment certifications according to federal requirements, and manages training records.**[73]

"All classes are open to all qualified union workers. The class schedule is communicated via a monthly calendar posted on the West Gulf Maritime Association website."[74] "Every longshore worker who operates any PIT must be certified through the West Gulf Maritime Association prior to accepting any employment on the equipment."[75] "All PIT operators

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[70] *Id.*

[71] *Id.*; *see Roundy's, Inc.*, 356 N.L.R.B. 126, 132 (2010) (rejecting theory raised for the first time in post-hearing brief), enfd. 674 F.3d 638 (7th Cir. 2012); *Stagehands Referral Serv., LLC*, 347 N.L.R.B. 1167, 1171–72 (2006) (denying post-hearing motion to amend), enfd. 315 Fed. Appx. 318 (2d Cir. 2009).

[72] See Decision of Administrative Law Judge Robert A. Ringler dated June 13, 2017 incorporated in *International Longshoreman's Association Local 28*, 366 N.L.R.B. No. 20 (2018).

[73] Resp. Ex. 3 (p. ILA28-000021) (emphasis added); TR. p. 8. Also see Resp. Ex. 8 (p. ILA000126); Tr. p. 224 l. 12. With the exception of calendars and individual worker information, Exhibit 8 is the same as that in existence in 2016. Tr. p. 225, l. 12-22; Tr. p. 237, l. 6-14.

[74] Resp. Ex. 3 (p. ILA28-000022).

[75] Resp. Ex. 3 (p. ILA28-000024).

are evaluated and recertified every three years."[76] Recertification must occur prior to the expiration of the three year certification.[77] "A worker who signed up for a class who fails to attend must wait 60 days to retake the class. A worker who fails to attend scheduled hands-on training must wait 160 days to retake the class."[78]

The General Counsel asserts classes Mata was allegedly denied were held 25 times between February and August 2016.[79] The General Counsel's math comports with neither the evidence nor the allegations. The following chart identifies the scheduled class-room sessions in Houston, Texas by month.[80]

Location: Houston, Texas

	Forklift	RoRo	Heavy Lift	TopLoader
Feb. 2016	02/02/16	02/04/16	02/08/16	
Mar. 2016	03/04/16	03/03/16	03/10/16	
Apr. 2016	04/07/16	04/05/16	04/08/16	04/19/16
May 2016	05/05/16	05/02/16		
June 2016	06/06/16	06/03/16	06/06/16	
July 2016	07/08/16	07/07/16	07/08/16	07/11/16

It is not apparent how the General Counsel arrives at 25.[81] It is apparent that the subject class-room portions were offered in Houston, Texas once a month and, at times, not at all. Using the General Counsel's months of February through June 2015, there were 15 classes offered in Houston, Texas.[82] Looking at the dates at issue according to the Complaint, March 1 to August 1, 2016, there were 16 classes offered in Houston, Texas.

[76] Resp. Ex. 3 (p. ILA28-000024).
[77] Resp. Ex. 3 (pp. ILA28-000025, ILA28-000026).
[78] Resp. Ex. 3 (ILA28-000024).
[79] GC Br. p. 14.
[80] Resp. Ex. 9; Tr. p. 8. August 2016 is omitted because Mata attended each class-room portion offered that month.
[81] It is possible the General Counsel is including refresher classes in its calculations. However, refresher classes are attended only after initial certification. See Resp. ex. 3 (p. ILA28-000025).
[82] GC Brief p. 14.

While some classes were offered in other cities, they were offered rarely and sporadically. More importantly, class spots in other cities were not obtained through Local 28.[83]

In addition to being wrong, the General Counsel's math is misleading because it implies each class spot was available to Local 28. Approximately sixteen individual locals obtained training through WGMA training program.[84] The available class spots were divided among those locals.[85] PIT class size typically ranged from 16 to 24 individuals.[86] Of the available spots, approximately half typically went to International Longshoreman's Association Local 24 ("Local 24").[87] The remaining 40 to 45 percent were split between other locals including Locals 28.[88] In short, the training spots available to Local 28 were limited. It is also important to note the Houston classes were scheduled at the beginning of each month, generally within the same week.

The General Counsel completely ignores Patrick McKinney's ("McKinney") testimony. This is surprising as McKinney's company, Tri-Kin Enterprises ("Tri-Kin") ran the WGMA training program for 37 years; ending in 2017.[89] McKinney conducted the classroom and hands-on sessions in accordance with the WGMA training calendars.[90] In fact, McKinney prepared the calendars subject to later modification by WGMA.[91] McKinney and WGMA created the sign-up list form the various locals utilized.[92] This form has been utilized since 2008 or 2009.[93]

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[83] Tr. p. 404, l. 1-8.
[84] Tr. p. 426, l. 23-p. 427, l. 1.
[85] Tr. p. 427, l. 2-8.
[86] Tr. p. 438, l. 10-22.
[87] Tr. p. 438, l. 2-9.
[88] Tr. p. 438, l. 2-6.
[89] Tr. p. 419, l. 1-17; p. 419, l. 20-23; Tr. p. 239, l. 11-13.
[90] Tr. p. 419, l. 24-p. 420, l. 5.
[91] Tr. p. 420, l. 12-p. 421, l. 9; Resp. Ex. 14 (p. ILA28-000169).
[92] Tr. p. 421, l. 13-p. 422, l. 1; Resp. Ex. 14 (pp. ILA28-000170-174).
[93] Tr. p. 422, l. 2-9; Tr. p. 425, l. 20-24.

Tri-Kin received the class lists for certification classes from WGMA.[94] The class list was created by WGMA based on lists submitted from the various locals.[95] WGMA compiled the final lists, ensuring the individuals listed were qualified to take the subject class.[96] These final lists were typically provided to Tri-Kin by WGMA between three days prior to and the morning of a class.[97]

On completion of the classroom portion, a hands-on portion was scheduled.[98] The hands-on portion was scheduled with the individual class members during the classroom portion by Tri-Kin personnel.[99]

The General Counsel now takes issue with Local 28's general involvement in WGMA's training program. The General Counsel's grounds are specious.

Harris is, and was at the time relevant to this proceeding, one of Local 28's Business Agents, its Financial Secretary, and a Contract Committeeman.[100] Harris has served in the elected positions of Business Agent and Financial Secretary since 2005 and Contract Committeeman since 2012.[101] Harris has also been responsible for coordinating with the WGMA training program on behalf of Local 28 since 2005.[102]

Despite the General Counsel's effort to portray it otherwise, Harris' role is straightforward. Harris collects the names of individuals and conveys those names to WGMA which then assigns the classes.[103] The names may come from an employer which requires training for a dedicated or regular worker or from individuals requesting to

[94] Tr. p. 424, l. 5-15.
[95] Tr. p. 424, l. 12-22.
[96] Tr. p. 424, l. 16-425, l. 5.
[97] Tr. p. 425, l. 25-p. 426, l. 5.
[98] Tr. p. 429, l. 2-6.
[99] Tr. p. 429, l. 7-p. 430, l. 2.
[100] Tr. p. 306, l. 1-4.
[101] Tr. p. 342, l. 12-p. 343, l. 2.
[102] Tr. p. 310, l. 7-25; Tr. p. 343, l. 6-13.
[103] Tr. p. 311, l. 2-10.

participate in a specific training class.[104] This process has not changed and is long-standing.[105]

The long-established process is not complicated. The week prior to the class, an announcement is made that classes are upcoming.[106] As noted *supra*, the Houston classes occurred early in the month and generally during the same week. As a result, these announcements normally occurred on the Monday of the last week of the month prior to the classes (i.e. last week of April 2016 for May 2016 classes).[107] An individual interested in attending a training class would then approach Harris or another staff member expressing interest.[108] If another staff member takes the information, they pass it to Harris.[109] The information is then written down and transferred to a sign-up sheet provided by the WGMA.[110] The sign-up sheet is then transmitted via e-mail to the WGMA, which, again as noted *supra*, ensures the individual is qualified and compiles the final list.[111] Harris provides the list to WGMA the Friday prior to the first scheduled class.[112] Harris does not determine who is on the final class list, WGMA makes that determination.[113] Respondent's Exhibit 13 contains an example of an e-mail Harris submits to WGMA.[114] The June 3, 2015 e-mail had as attachments the class lists prepared by Harris.[115]

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[104] Tr. p. 311, l. 5-18.
[105] Tr. p. 202, l. 8-l. 22; Tr. p. 343, l. 22-p. 344, l. 8.
[106] Tr. p. 309, l. 19-24.
[107] Tr. p. 309, l. 19-24; Tr. p. 314, l. 21-p. 315, l. 4.
[108] Tr. p. 312, l. 5-14.
[109] Tr. p. 313, l. 20-p. 314, l. 2.
[110] Tr. p. 312, l. 16-p. 313, l. 3.
[111] Tr. p. 314, l. 10; Tr. p. 313, l. 1-3.
[112] Tr. p. 366, l. 2-13/
[113] Tr. p. 313, l. 8-16.
[114] Resp. Ex. 13; Tr. p. 353, l. 20-24; Resp. Exs. 14 & 18 (pp. ILA28-000170-175; ILA28-000200-204).
[115] Tr. p. 349, l. 12-25; Tr. p. 364, l. 22-p. 365, l. 2.

The timing of the name collection is well reasoned. The announcement is made on a Monday morning to permit the majority of workers to be apprized.[116] Monday morning is when the job dispatches for the week come in.[117] Names are collected during that week because WGMA changes the class schedule from time to time.[118] This is why Harris does not pre-assign individuals to classes.[119] The week prior to the announcement, Harris confirms the class schedule with the WGMA to ensure no changes have been made.[120] Quite reasonably, Harris allows the workers to control their schedule rather than pre-assign them and then have to reassign them if a class cancels or if the individual's schedule changes.[121] This is particularly apt given the 60 day penalty noted *supra* for a worker who fails to show for a class.

WGMA does, at times, inform Harris of limitations on class spots available to Local 28.[122] If a class is full and Harris is informed, he does not automatically put the individual on a list for the following month or maintain a list of individuals who were unable to take a class for some reason.[123] Harris asks the individual to approach him again for the next month.[124] The reason for this is, again, quite reasonable. Harris does not know what the final class schedule or size is for future months[125] Harris does inform individuals who don't make a final class list that they can try to attend by stand-by.[126] However, stand-by

[116] Tr. p. 319, l. 13-18.
[117] Tr. p. 319, l. 19-20.
[118] Tr. p. 319, l. 23-24.
[119] Tr. p. 319, l. 23-p. 320, l. 2.
[120] Tr. p. 320, l. 4-7.
[121] Tr. p. 319, l. 25-p. 320, l. 4.
[122] Tr. p. 324, l. 1-14; Tr. p. 367, l. 3-8.
[123] Tr. p. 325, l. 19-24; Tr. p. 326, l. 3-6.
[124] Tr. p. 326, l. 3-6; Tr. p. 362, l. 13-24.
[125] Tr. p. 325, l. 19-p. 326, l. 2.
[126] Tr. p. 325, l. 3-12.

admittance is entirely up to the trainer and since attending class requires missing work, many individuals decline the opportunity.[127]

The General Counsel implies that Harris gives regular and dedicated workers preference. However, this is not an issue of preference, it is an issue of class spot availability.[128] Employers inform Harris that they need specific individuals to obtain training so Harris can submit their names to the WGMA.[129]

The General Counsel portrays Local 28's process as undocumented. Harris testified he maintains a documented file.[130] The General Counsel attempted to impeach Harris by asserting his testimony concerning keeping a "running-list" differed in the two hearings of this matter.[131] When afforded the opportunity, Harris explained he was referring in this hearing to the monthly list he uses to prepare and send his final list to the WGMA rather than a separately maintained list of people requesting training.[132] Harris testified he does not maintain any other list.[133] Harris explicitly identified the documents he maintains for each month, including the lists he submits to WGMA.[134] The ALJ noted the confusion caused by the General Counsel's attempted impeachment in her Decision.[135] The General Counsel takes exception to the ALJ's failure to "explicitly discredit" Harris'

[127] Tr. p. 325, l. 15-18.
[128] Tr. p. 326, l. 19-p. 327, l. 12. A dedicated worker is an individual who is dedicated to a specific location for a week at a time assuming a job is available and the work load requires it. Tr. p. 276, l. 1-14. A regular worker is an individual who are guaranteed regular employment by a specific employer and are subject to that employer's call. Tr. p. 328, l. 3-14.
[129] Tr. p. 311, l. 5-18.
[130] Tr. p. 320, l. 21-p. 321, l. 2.
[131] Tr. p. 320-l. 13-p. 322, l. 17.
[132] Tr. p. 362, l. 13-24.
[133] Tr. p. 362, l. 1-12.
[134] Tr. p. 363, l. 22-p. 365, l. 18; Resp. Ex. 14; Tr. p. 383, l. 12-21; Resp. Ex. 18; Tr. p. 384, l. 12.
[135] ALJ Decision p. 4, (l. 2-10).

testimony concerning documentation."[136] The General Counsel's desired exception requires ignoring the evidence. That the ALJ did not do so is not grounds for exception.

There is no basis for alleging, much less finding that the WGMA's training program or Local 28's training referral process is arbitrary. A union's duty of fair representation obligates it to deal even-handedly with workers in a hiring hall.[137] A union's conduct is arbitrary when it is "so far outside a wide range of reasonableness that it is wholly irrational or arbitrary."[138] The "wide range of reasonableness" allows the union to make discretionary decisions and judgments, even if they are ultimately wrong.[139] A union only breaches its duty of fair representation when it engages in "deliberate conduct that is intended to harm or disadvantage hiring hall applicants."[140] It is apparent from the evidence that Local 28's training referral process is reasonable no matter how narrowly one wishes to draw the contours of reasonableness.

The General Counsel argues that an exclusive hiring hall has a heightened duty of fair dealing, requiring it to operate using "objective criteria" and "consistent standards," citing the District of Columbia Circuit.[141] Even if this heightened standard applies, however, there is no evidence that Local 28's training referral process is arbitrary. Rather the evidence demonstrates the process is, and has long been, consistent, straight-forward, uniform, routine, rational, stable, well-reasoned, and effective.

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[136] GC Exception 1.
[137] *Boilermakers Local No. 374 v. N.L.R.B.*, 852 F.2d 1353, 1357 (D.C. Cir. 1988), enfg. 284 NLRB 1382 (1987).
[138] *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1244 (7th Cir. 1997) (quoting *Air Line Pilots' Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991)).
[139] *Jones v. Int'l Union of Operating Engineers*, 155 F. Supp. 3d 191, 204 (N.D.N.Y. 2015), affd. 671 Fed. Appx. 10 (2d Cir. 2016).
[140] *Jacoby v. N.L.R.B.*, 325 F.3d 301, 304 (D.C. Cir. 2003), rehearing denied.
[141] *Id.*; Br. at 19.

A. The General Counsel's Proposed Evidence Demonstrating that Local 28's Training Referral Process was Arbitrary Shows the Process was not Arbitrary

Mata asserts she was prevented from navigating Local 28's training referral process. The General Counsel asserts this was, in part, because it was operated arbitrarily as to Mata.[142] The General Counsel points to three aspects of the process which it alleges support its position. First, Mata was told she had to go through Harris for the classes yet in December 2015 San Miguel, Jr. offered her a "deal." Second, Harris took it upon himself to put her on a stand-by list in June 2015 but did not do so later. Third, the General Counsel looks to Mata getting into classes after she reported her allegation that Harris had previously sexually propositioned her as evidence that the process is a "farce."[143]

i. The San Miguel Jr. "Deal" was not a Bargain, it was a Response to Mata's June 30, 2016 Complaint that Harris Propositioned Her

When considering the alleged "deal" the General Counsel asserts evidences arbitrary treatment, it is, once more, what is omitted that is important.

San Miguel, Jr.'s testimony concerned the General Counsel's abandoned claim of coercion. In his testimony, San Miguel, Jr. described a December 2016 conversation with Mata after he learned of her NLRB Complaint against Local 28.[144] During the conversation, San Miguel, Jr expressed concern because his and his father's names were in the Complaint.[145] Mata, among other things, expressed her desire not to "deal" with

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[142] GC Brief p. 22.
[143] GC Brief. P. 20-21. The General Counsel lumps these into its argument that the process is generally arbitrary. GC Brief pp. 20-21. However, because they are more properly seen as part of the allegations concerning Mata individually, they are dealt with separately here. Regardless, these matters support the lack of arbitrariness in the overall process.
[144] Tr. p. 454, l. 6-20; p. 454, l. 24-p. 455, l. 25.
[145] Tr. p. 455, l. 2-7.

Harris.[146]. In response, San Miguel, Jr. told Mata she did not have to "deal" with Harris.[147] San Miguel, Jr. was then asked:

> Q. And did you all discuss the training issues during that conversation?
> A. Training issues?
> Q. Her ability to get training.
> A. No. Well, I told her that she didn't have to go - - in order to get training, she can come to me anytime, you know, and that was the deal.[148]

The General Counsel takes the word "deal" and urges it evidences a December 2016 bargain offered by San Miguel, Jr. Where this conversation was formerly looked to as evidence of coercion; it is now looked to as evidence of arbitrary treatment.

In an effort to square a circle, the General Counsel asserts this alleged "deal" is evidence that no objective criteria for administering the training referral process exists.[149] To connect this to Mata, the General Counsel argues that because San Miguel, Jr. offered to be Mata's conduit for training, Harris was not the only conduit. As a result, the process was arbitrary as to Mata because she was previously required to go through Harris.

The General Counsel's premise is wrong. Harris was clear, the communication to the WGMA "has to go through" him even if other officers, such as San Miguel, Jr., take the name initially.[150] If an individual approaches another official, that official communicates that to Harris.[151] So, Mata's testimony that Harris was the only person who could refer her for training comports with Harris' testimony. Since this supports a conclusion that Mata was treated the same as others, the General Counsel misconstrues San Miguel, Jr.'s testimony to counter it.

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[146] Tr. p. 455, l. 14-16.
[147] Tr. p. 455, l. 18-22.
[148] Tr. p. 456, l. 1-7.
[149] GC Brief p. 20-21. This also appears to be the basis for Exceptions 15 and 16.
[150] Tr. p. 313, l. 20- p. 314, l.-4. Mata testified similarly. Tr. p. 44, l. 9-12.
[151] Tr. p. 313, l. 17-p. 314, l. 2.

The General Counsel fails to mention that ensuring Mata would not have to "deal" with Harris in regard to training was not a bargain arrived at in December 2016, it was the result of Local 28's addressing Mata's claims against Harris five months earlier. Mata brought her complaints concerning Harris to Local 28's attention on June 30, 2016.[152] This occurred during a conversation with San Miguel, Jr., Mata's cousin.[153] Because Mata could not meet that day, a meeting concerning the matter was held on the afternoon of July 1, 2016; Mata, Larry Sopchak, A.L. Williams, and San Miguel, Jr. attended.[154] Due to the seriousness of the allegations, Sopchak took contemporaneous notes concerning the matter.[155] It was at this meeting that Mata initially raised her claim concerning lack of training.[156] Critically, as it applies to the alleged December 2016 "deal," it was determined at that time and with Mata that she need not go through Harris for Local 28 business. Rather, A.L. Williams or San Miguel, Jr. would be available to her.[157] This was memorialized by Sopchak in his notes where he wrote:

> On Thursday, July 7, 2016, Mrs. Mata was notified to attend a Forklift training class on Friday, July 8, 2016 @WGMA (Set up by Tim Harris; notify by Jesse & Larry by phone)-Mrs. Mata stated she was unable to attend on such short notice.[158]

Since Mata initially approached San Miguel, Jr. with her complaint about Harris, it was believed that San Miguel, Jr. was the best person to communicate with her.[159] There was no December 2016 "deal." Rather, San Miguel, Jr. was merely describing a course of

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[152] Tr. p. 45, l. 23-p. 48, l. 7; p. 170, l. 14-p. 171, l. 3; TR p. 446, l. 8-13.
[153] Tr. p. 74, l. 17-25; Tr. 445, l. 21-p. 446, l. 1.
[154] Tr. p. 76, l. 3-9; TR p. 172, l. 172, l. 16-21; Tr. p. 470, l. 17-23. Sopchak was Local 28's President. Tr. p. 468, l. 1-13. San Miguel, Jr. was Local 28's Business Agent/Treasurer. Tr. p. 445, l. 12-20. A.L. Williams was Local 28's Assistant Vice President. Tr. p. 42, l. 14-20.
[155] Resp. Ex. 21.
[156] Tr. p. 76, l. 13-21; Tr. p. 172, l. 10-15; Tr. p. 271, l. 15-19.
[157] Tr. p. 450, l. 8-25.
[158] Resp. Ex. 21 (p. ILA28-000218); Tr. p. 476, l. 1.
[159] Tr. p. 469, l. 22-p. 470, l. 10; p. 479, l. 6-19.

conduct which had been in place since early July 2016. A course of conduct which arose as a result of Local 28 attempting to address Mata's charges. A course of conduct that did not represent a modification of the training referral process except that Mata did not have to directly request training from Harris.

ii. The July 8, 2016 Forklift Class Spot Resulted from Addressing Mata's July 1, 2016 Complaint about Training Denial

The General Counsel takes a similar tact in using Local 28's effort to address Mata's July 1, 2016 complaint about denial of training to support its current claim that the training referral process was arbitrary.[160] The General Counsel asserts that securing Mata a spot in a 7:30 a.m., Friday, July 8, 2016 Forklift class demonstrates that "the whole system [is a] farce."[161]

Sopchak testified concerning the July 8, 2016 class:

> So, one of the directives that we received from Mr. Nelson [Local 28 counsel] on the 6th, was that we needed to try to, you know, make some - - make this class available to her, as soon as possible. My understanding was that this opportunity did come up on a short notice, and it apparently - - apparently someone that was scheduled to be there could not make it, and so we directed - - well, I directed Jesse to call Ms. Mata and see if she could be - - could make herself available for that class, ...[162]

The remarkable thing about the July 8, 2016 Forklift class is that Mata, after allegedly being denied the class for years, turned it down.[163] Further evidencing the lack of mendacity in scheduling is the fact that a Heavy Lift class was scheduled at 1:00 p.m. the same day.[164] If, as the General Counsel asserts, Local 28 was able to secure classes "at any

[160] GC Brief p. 21.
[161] GC Brief p. 21.
[162] Tr. p. 478, l. 3-13.
[163] Tr. p. 478, l. 13-15.
[164] GC Ex. 2 (p. 6).

time at the whim of the administering officials," this class should have been equally available and offered.

iii. The August 2016 Training Classes Attended by Mata also Resulted from Addressing her July 1, 2016 Complaint about Training Denial

The General Counsel points to Mata's August 2 and 4, 2016 training class attendance as evidence of an arbitrary system.[165] Mata's attendance shows the opposite. As discussed *supra*, Harris typically announced upcoming training on the last Monday of the month prior to the offering and submitted his list on the Friday of that week. The first class in August 2016 occurred on Monday, August 1, 2016.[166] As a result, an announcement would have been made on Monday, July 25 and the list submitted on Friday, July 29. Mata made it clear on July 1, 2016 that she wanted to attend training classes. Even though Mata declined the July 8, 2016 opportunity, Local 28 continued to work to secure training opportunities as a result of her July 1, 2016 complaint.[167] It is inconceivable that Local 28 would not have ensured Mata was listed and in the August 2016 classes given her charges against Harris and the fact that a month elapsed between Mata bringing her complaint to Local 28's attention and the August 2016 classes. One can imagine the General Counsel's position had Local 28 not done so. Regardless, rather than evidencing arbitrariness, Mata's August 2016 attendance evidences that timely requests to Local 28 resulted in securing training spots.

[165] GC Ex. 2 (p. 7). Top Lift was not offered in August 2016.
[166] GC Ex. 2 (p. 7).
[167] Tr. 478, l. 16-p. 479, l. 5.

iv. Mata's Attendance in a June 11, 2015 Yard Tractor Class fits Squarely Within the Local 28's Training Referral Process and Seeking Special Treatment for Mata would Result in an Arbitrary Training Referral Process

The General Counsel's third complaint regarding Local 28's training referral process is that by submitting Mata's name as a stand-by in June 2015, Local 28 should have done so on other occasions. Where the General Counsel's first two complaints can be termed "damned if you do, damned if you don't," this one can be termed, "no good deed goes unpunished." The argument is particularly questionable given the fact that when Local 28 took essentially the same step securing a spot in the July 8, 2016 class, Mata turned it down. Even more glaring is the fact that the General Counsel's citation to Local 28's Post Hearing Brief as evidence of the June 2015 placement is false. No such statement was made in Local 28's brief.[168]

The General Counsel takes issue with the June 5, 2015 request that Mata be placed on stand-by for a Yard Tractor class.[169] The General Counsel posits either that this occurrence was arbitrary or, having done so once, it was arbitrary not to do so again.

In April or May 2015 Mata began regularly seeking employment through Local 28.[170] Mata's first day of employment was May 14.[171] Mata obtained job training certifications in June 2015.[172] These certifications were in Longshore Skills, HazMat, and Yard Tractor.[173] Harris submitted his lists on Wednesday, June 3, 2015.[174] The Yard Tractor class was scheduled on June 11, 2015.[175] Harris sent an e-mail requesting stand-

[168] Briefs are not part of the record in any event. 29 C.F.R. § 102.45(b).
[169] Resp. Ex. 2 (Tr. p. 8, l. 23-24); Resp. Ex. 13 (Tr. p. 353, l. 23-24).
[170] Tr. p. 135, l. 4-18.
[171] Tr. p. 133, l. 23-p. 134, l. 1.
[172] Resp. Ex. 2.
[173] Resp. Ex. 2.
[174] Resp. Ex. 13; TR p. 364, l. 22-p. 365, l. 2.
[175] Resp. Ex. 13.

by status for Mata in that class on Friday, June 5, 2015.[176] This comports with Harris' normal schedule described *supra*; i.e. collecting and submitting lists the week prior to the first class. The first week of June 2015 had only refresher classes, management classes, and classes in Lake Charles, Louisiana scheduled.[177] Mata would not have been placed in a Refresher class and Lake Charles, Louisiana classes are not referred by Harris.[178] Thus, Harris's list was submitted, as was normal, during the first week of June 2015; June 1-5, 2015.

Harris detailed the events surrounding the placement. Harris' June 3, 2015 e-mail accompanied the lists submitted identifying Local 28's attendees for June 2015.[179] The two individuals submitted for the Maritime Supervisory class resulted from a request from their employer because they worked in a foreman or management position.[180] The June 5, 2015 e-mail identifies additional individuals for classes "if available."[181] The June 5, 2015 e-mail includes Mata as a stand-by for the Houston, Texas Yard Tractor class.[182]

Harris explained that Mata had recently returned to the waterfront and, as a result, required various certifications, including Longshore Skills.[183] Mata was previously certified in Yard Tractor so certification in that skill was sought.[184] Mata's previous certification expired on April 1, 2010, five years before.[185] While previously Mata was sporadic in her attendance at Local, 28, at this time, Mata began regularly seeking

[176] Resp. Ex. 13.
[177] Resp. Ex. 14 (p. ILA28-000169).
[178] Tr. p. 39, l. 3-11; Tr. p. 41, l. 22-p. 42, l. 1; Tr. p. 403, l. 15-20. Refresher classes are for certified individuals who had incidents on equipment they were operating. Tr. p. 404, l. 1-8.
[179] Resp. Ex. 13; Tr. p. 349, l. 10-25.
[180] Tr. p. 349, l. 17-21.
[181] Tr. p. 349, l. 24-25.
[182] Resp. Ex. 14; Tr. p. 350, l. 1-5.
[183] Tr. p. 350, l. 6-22.
[184] Tr. p. 350, l. 6-22.
[185] Resp. Ex. 2.

employment.[186] Yard Tractor is a truck.[187] The majority of Mata's work history involves driving trucks.[188] Mata has had a Commercial Driver's License since 2004.[189] Mata testified she signed up for the June 2015 classes through Harris.[190] The General Counsel concedes that "Mata requested yard truck training after the class had been filled."[191]

Harris explained that if an individual approached him after he submitted his lists to WGMA, he would try to secure a stand-by spot for them.[192] In the case of the June 2015 class, Mata's name is included in an e-mail prior to the class and the same week Harris submitted Local 28's list. Therefore, Mata's listing occurred in the normal course of securing spots in the June 2015 classes. In short, it did not contravene the normal process; it was done in compliance with it.

The General Counsel's apparent alternative position, that Local 28 was arbitrary by not submitting Mata's name as a stand-by on other occasions rests on several assumptions. First, it assumes Mata actually made requests. Second, it assumes Mata made the requests between the time Harris submitted Local 28's lists and prior to the classes. Third, it assumes Mata was available to attend the classes. The General Counsel's argument also, ironically, would have required Local 28 treat Mata differently than others seeking training. Applying the theoretical presented by the General Counsel, that Harris should have submitted Mata's name as a stand-by on his own, either regardless of the circumstances, or when she allegedly requested training "too late in the month prior," would contravene the process applicable to all other applicants and provide special

[186] Tr. p. 135, l. 4-18.
[187] Tr. p. 259, l. 5-9; p. 121, l. 11-17.
[188] Tr. p. 27, l. 24-p. 28, l. 1; Tr. p. 104, l. 2-11; Resp. Ex. 6; Tr. p. 371, l. 23.
[189] Tr. p. 28, l. 11-12.
[190] Tr. p. 136, l. 15-21.
[191] GC Brief. P. 21.
[192] Tr. p. 405, l. 9-p. 406, l. 5.

consideration only to Mata. The General Counsel actually invites an arbitrary process in arguing the process was arbitrary as to Mata.

v. The General Counsel Fails in its Effort to Establish the Training Program was Arbitrary Generally or Specifically as to Mata

The cases cited by the General Counsel to support its claim of arbitrariness involve unions that treated certain applicants disparately; such as insisting on proof from two individuals "beyond any doubt" that work was performed or excluding workers unknown to union officials.[193] The General Counsel offers no evidence that Mata was treated differently from other applicants. Rather, the General Counsel insists Mata should have been treated differently from other individuals. Mata should have been kept on a non-existent list of individuals who sought training but did not get in a class; she should have been unilaterally placed on stand-by lists; someone other than Harris should have submitted a list with her name on it to the WGMA; Mata should not have been placed in August 2016 classes all because it made the process arbitrary. The General Counsel's argument is based on allegations that "the system is unwritten and involves no records," "there are no objective criteria for making decisions as to who to enroll in situations of limited availability," and "the system is not administered in accordance with any objective criteria."[194] The evidence proves these allegations wrong. For example, Local 28 does not make decisions regarding who is enrolled in training of limited availability. Just as importantly, even if Local 28 failed to use objective criteria, the absence of criteria alone is not a basis for concluding that the union acted arbitrarily.[195] Similarly a lack of written

[193] *Boilermakers Local No. 374*, 852 F.2d at 1359; *Plumbers & Pipe Fitters Local Union No. 32 v. N.L.R.B.*, 50 F.3d 29, 34 (D.C. Cir. 1995), enfg. 312 NLRB 1137 (1993), cert. denied 516 U.S. 974 (1995).
[194] GC Brief, p. 20.
[195] *Lucas v. N.L.R.B.*, 333 F.3d 927, 936 n.10 (2003) ("[W]e need not determine whether the absence of any objective criteria constitutes a separate basis for concluding that the Union acted in an arbitrary manner."), revg. 332 NLRB 1 (2000).

records in itself is insufficient to prove arbitrary conduct.[196] In short, the General Counsel fails to show that either the WGMA training program was arbitrary or that Local 28's training referral process was arbitrary. Similarly, the General Counsel fails to show that Local 28 acted arbitrarily towards Mata in connection with training.

VII.

The General Counsel's Allegations that Local 28 was Generally Discriminatory and Discriminated Against Mata have no Basis

A. The General Counsel's Argument that the *Wright Line* Analysis was not Used by the Administrative Law Judge is Wrong and its Explicit Use or Non-Use did not Impact the Administrative Law Judge's Decisions

The General Counsel argues in Exception 10 that the *Wright Line* framework should be applied to Mata's gender discrimination claim.[197] The General Counsel asserts "there is no reason why the *Wright Line* test would be less useful in analyzing discrimination claims based on gender than it would be in analyzing discrimination claims based on activity."[198] As the ALJ points out, none of the cases cited by the General Counsel support an analysis under *Wright Line* for alleged gender discrimination rather than discrimination based on protected activity.[199] The General Counsel offers nothing new supporting its assertion that gender alone is subject to the *Wright Line* analysis. Despite the General Counsel's assertion to the contrary, the ALJ applied the *Wright Line*

[196] *Morrison-Knudsen Co.*, 291 N.L.R.B. 250, 250 (1988) ("These practices may lend themselves to abuse, allowing a union to disguise favoritism or patronage in referrals; they are not, however, sufficient in themselves to prove such abuse.").
[197] *Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980); GC Exception 10.
[198] GC Brief p. 25.
[199] *See* Op. at 15.

analysis.[200] The ALJ simply determined the evidence neither fit nor supported Mata's claim.[201]

Even so, and assuming gender alone fits within the analysis, the General Counsel's discrimination case fails. The General Counsel's argument falters on its failure to show a denial of training opportunities resulted from gender animus, i.e. discrimination.

Under the *Wright Line* analysis, the General Counsel must make *a prima facie* showing sufficient to show that gender was a "motivating factor" in the union's alleged adverse action.[202] To successfully show this, the General Counsel must show gender animus on the part of Local 28.[203] If the General Counsel meets this burden, the burden shifts to Local 28 to show, by a preponderance of the evidence, that the same outcome would have occurred regardless of gender.[204] This differs from the *McDonnel Douglas* analysis.[205]

The ALJ applied the animus test.[206] The ALJ stated, "It is at the third step, requiring animus and/or hostility towards Mata and causing adverse action where this theory particularly fails."[207]

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[200] ALJ Decision p. 15, l 13-19. "For General Counsel's second theory, in cases where a union is accused of action based upon unlawful discrimination or motivation, the appropriate analysis falls under *Wright Line.*"
[201] ALJ Decision p. 15. L. 11-p. 16, l. 9.
[202] See *NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 787 (7th Cir. 2013) (applying framework to alleged discrimination because of union member's political activity), affg. 357 NLRB 1844 (2011); *Aerospace Industrial Dist. Lodge 751*, 270 NLRB at 1066 (applying framework to alleged refusal to file a grievance because of non-union status); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007) ("… the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action.") , enfd. 577 F.3d 467 (2d Cir. 2009).
[203] *Consolidated*, 350 NLRB at 1065.
[204] See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983), *abrogated in part on other grounds by Dir., Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *NLRB*, 723 F.3d at 788.
[205] See *Walker v. Mortham*, 158 F.3d 1177, 1183, n.10 (11th Cir. 1998).
[206] ALJ Decision p. 15, l. 38-p. 16, l. 9.
[207] ALJ Decision p. 15, l. 38-40.

The General Counsel's position at hearing was that Harris's alleged denial of training opportunities was in retaliation for being spurned by Mata.[208] The facts belied this position so the General Counsel focuses on a general gender animus theory.[209] The General Counsel inserts a subtle modification hoping to improve the ground. The General Counsel directs its attention to March 1, 2016 to June 30, 2016.[210] The General Counsel justifies this claiming "Because some classes were offered to her after she filed the charge, the relevant requests here are those that Mata made from March 1-June 30, 2016."[211] As noted *supra*, the time period subject to the Complaint is March 1 through August 1, 2016. Moreover, Mata's charge was signed on August 1, 2016 and filed on August 5, 2016.[212] The reason for seeking to avoid July 2016 is, as discussed *supra*, because when Mata brought her claims against Harris to Local 28's attention, it took immediate action, including securing a spot for Mata in a training class; a spot Mata declined.

Another problem the General Counsel faced with its initial theory was that Mata testified Harris propositioned her repeatedly between 2010 and 2015.[213] The last time Mata alleges Harris did so was before April 5, 2015.[214] As discussed *supra*, that was the same time period Mata returned to Local 28 regularly and she quickly obtained employment through Local 28 generally and training through Harris specifically. This

[208] Tr. p. 14-15. "Ms. Mata has been personally and repeatedly assaulted by Union official, Tim Harris, after requesting the required training certifications she needed to be eligible for jobs. Harris proceeded to prohibit her from receiving certifications for different kinds of work because he did not think they were suitable for her."
[209] GC Brief p. 25. "In the case at hand, the General Counsel alleges that Respondent's agent, Tim Harris, failed to enroll Mata in training and that he was unlawfully motivated in doing so by Mata's gender."
[210] GC Brief p. 26.
[211] GC Brief p. 26.
[212] GC Ex. 1(a).
[213] Tr. p. 131, l. 4-7.
[214] Tr. p. 131, l. 8-22.

presented an obvious complication to the theory that Harris denied Mata training in retaliation for being rejected.

Another problem faced by the General Counsel was Mata's admitted sporadic attendance at Local 28 prior to her return in 2015 and Harris' testimony that securing training for a person who appears sporadically is difficult because of the monthly training schedule.

Another complicating factor is the lapse of time between the last alleged proposition and any adverse employment action. In Title VII cases, the Seventh Circuit stated that a substantial time lapse between the protected activity and the adverse action is "counter-evidence" of any causal connection.[215] Courts will generally infer causation when the time periods range from a few days to a few months, but seldom for time lapses over a year.[216] In *quid pro quo* sexual discrimination cases, four month and six month periods have been held too long to support a claim.[217] In this case, we don't have any evidence affirmatively showing a specific adverse employment action other than Mata's unsupported and contradicted claims of requesting and being denied training.[218] However, if we take the General Counsel's desired time period beginning March 1, 2016, at least 11 months elapsed between the last alleged proposition and any adverse employment action. Of course, as discussed *supra*, Harris recalled only a few times Mata approached him inquiring about training. One was in June 2015 when she secured a

[215] *Goetzke v. Ferro Corp.*, 280 F.3d 766, 775 (7th Cir. 2002).
[216] *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 38 (D.D.C. 2004).
[217] *Sewell v. Smith Int'l*, No. H-08-2063, 2009 WL 10694753, at *6, (S.D. Tex. July 28, 2009) (six months); *Carter v. New York*, 310 F. Supp. 2d 468, 478 (N.D.N.Y. 2004) (four months).
[218] Mata generally claims lost employment opportunities but no specific jobs were evidenced as lost. Moreover, as evidenced by Resp. Exs. 7 and 8. Mata has maintained steady employment since returning to the waterfront. At the time of the hearing, Mata was on track to achieve seniority status which requires 1000 hours of work between October 1, 2017 and September 30, 2018. Tr. p. 374, l. 7-p. 377-7.

stand-by spot and the other two occurred in the middle of the month when the classes had already occurred and Harris was not yet collecting names for the next month's training. In contrast, Mata offered no evidence substantiating her alleged requests.

Yet another problem exists for the General Counsel in its effort to apply the *Wright Line* analysis. The ALJ analyzed the period after March 1, 2016 under the standard presented in *Vaca v. Sipes,* 336 U.S. 171, 87 U.S. 903, 17 L. Ed.2d 842 (1966).[219] Specifically, the ALJ considered whether Local 28's conduct was based on discriminatory treatment.[220] The ALJ stated:

> Regarding the second grounds, although I give General Counsel the benefit of the doubt about Harris likely engaging in unwanted touching, I find insufficient intent to discriminate and deny training upon this reason based upon credited evidence.[221]

The ALJ continued, stating, "Secondly, the alleged touching had stopped in the previous year and was increasingly remote. Thirdly, I did not credit Mata made all timely requests that she claimed."[222] The General Counsel does not except to the application of *Vaca*. In fact, the General Counsel cites it as the standard for its assertion that "The duty of fair representation governs a union's actions as they pertain to the administration of training" and that gender discrimination violates the duty of fair representation.[223]

The General Counsel attempts the same diversion as the appellant in *Wells v. Chrysler Group, LLC*, 559, Fed. Appx. 512 (6th Cir. 2014). In *Wells* the Sixth Circuit wrote:

> Regarding the discrimination claim against the union, the district court employed the proper standard when it dismissed the claim for failure to demonstrate a breach of the duty of fair representation. Wells argues that she did not bring a claim for a breach of the duty of fair representation, but rather that her claims were for race and sex discrimination under Title VII.

[219] ALJ Decision p. 14, l. 11-p. 15, l. 9.
[220] ALJ Decision p. 14, l. 13-14; ALJ Decision p. 15, l. 1-9,
[221] ALJ Decision p. 15, l. 1-3.
[222] ALJ Decision p. 15, l. 7-9.
[223] GC Brief pp. 18, 22.

> This meritless argument raises form above substance. What Wells now argues that she actually claimed is what the district court actually considered, albeit with an inconsequential difference in name and emphasis.
>
> The duty of fair representation incorporates a requirement that the union not act discriminatorily. Additionally, Title VII makes it unlawful for a union to deny fair representation based upon race or sex.[224]

In short, there is functionally no difference between the *Vaca* standard and the *Wright Line* analysis in a gender discrimination claim. Each requires analysis of and a finding of gender based motivation and animus. This is, of course, precisely what the ALJ did.

B. Even Utilizing the *Wright Line* Analysis as Requested by the General Counsel's does not Change the Administrative Law Judge's Decisions

Assuming the *Wright Line* analysis was not used and applicable, the General Counsel presents several arguments under it. None of these arguments are availing.

C. Training Availability from other Locals is Available but Local 28 Need not Assert it as a Defense to Mata's claim of Discrimination against Mata

The General Counsel presumes Local 28 will argue Mata could have obtained training through other locals.[225] While this is true, it is not an argument Local 28 asserts to discount the General Counsel's claim of gender discrimination.[226]

D. Mata's Training Request Testimony was Contradicted and Unsupported and Fails to Offer Anything Addressing Gender Discrimination

Crediting Mata's calculations, she alleges she requested training between 36 and 40 times between March 1 and June 30, 2016. Unlike the ALJ who did not, one must give full credence to Mata to accept this. Mata claims she was at Local 28's hiring hall every

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[224] *Wells v. Chrysler Group, LLC*, 559 Fed. Appx. 512, 513-14 (6th Cir. 2014) (citations omitted). This case is cited by the General Counsel in its brief. GC pp. 23, 24.
[225] GC Brief p. 26.
[226] GC Ex. 5 (p. 24, l. 20-p. 25, l. 4).

day during this period from approximately 6:00 a.m. to 4:30 p.m.[227] Of course, Mata's work records bely this testimony.[228] Moreover, Mata testified she became a dedicated worker as a truck driver with Ceres Gulf Winds in January 2016.[229] As Mata testified, that meant she "showed up on Monday" and remained the week until they did not need her any longer.[230] Mata remained a dedicated worker through January or February 2017 when she began receiving performance complaints from her employer.[231]

Other testimony also casts doubt on Mata's reported attendance. Both Harris and San Miguel, Jr. describe Mata's attendance at the hall as sporadic.[232] San Miguel, Jr. noted that he often called or texted Mata with jobs to which she would report directly.[233] The General Counsel offered one of Mata's texts which serves as an example of this.[234] Harris testified he only recalled three times since Mata returned to the waterfront in May 2015 that she sought training.

Obviously, Mata's self-serving testimony was called into doubt by other evidence. Like much of Mata's testimony, it was hoped generalities would suffice and it would be assumed that some of these alleged inquiries occurred at the appropriate time when Harris was preparing the training lists.

In addition, the General Counsel fails to explain how requesting training evidences the first prong of the *Wright Line* test. As is discussed i*nfra* and as the ALJ found, when asked "the question about why she thought Harris was not putting her on the training list"

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[227] Tr. p. 34, l. 23-p. 35, l. 9.
[228] Resp. Exs. 6, 7.
[229] Tr. p. 203, l. 6-204, l. 16.
[230] Tr. p. 203, l. 11-16.
[231] Tr. p. 204, l. 3-8; Resp. Ex. 11.
[232] Tr. p. 412, l. 9-p. 413, l. 21; Tr. p. 458, l. 6-25.
[233] Tr. p. 458, l. 5-15; GC Ex. 4 (09/26 text).
[234] GC Ex. 4 (09/26 text).

Mata's answer was not because of discrimination, but because Harris did not want her to perform certain jobs.[235] Unlike the General Counsel, Mata failed to attribute denial of training to discrimination.

E. Even Assuming Harris Inappropriately Propositioned Mata, it Fails to Evidence that Gender was a Motivating Factor in her Alleged Inability to Obtain Training

The ALJ "presumed that Harris engaged" in inappropriate conduct.[236] In doing so, the ALJ gave Mata "the benefit of the doubt" on this subject.[237] However, the ALJ found "insufficient intent to discriminate and deny training upon this reason based on the credited evidence."[238] While this may suffice as part of a *prima facie case* under the Title VII cases cited by the General Counsel, it is insufficient to do so under *Wright Line*. To establish a *prima facie case* it must be shown that gender was a "motivating factor" in the alleged adverse action.[239] It is not sufficient that improper conduct occurred.

Moreover, as noted *supra*, Mata testified that the last time this allegedly occurred was before April 2015. This was at the time Mata returned on a regular basis seeking employment through Local 28. It was also a month before she began obtaining employment through Local 28 and two months before she obtained training through Harris. The General Counsel asserts the operative time period in this case began on March 1, 2016, almost a year after the alleged last claimed proposition. The General Counsel fails to offer any evidence suggesting a nexus between the alleged occurrences

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[235] ALJ Decision p. 7, l. 4-12.
[236] ALJ Decision p. 13, l. 48-49.
[237] ALJ Decision p. 15, l. 1-2.
[238] ALJ Decision p. 15, l. 2-3.
[239] See *NLRB*, 723 F.3d at 787 (applying framework to alleged discrimination because of union member's political activity); *Aerospace Industrial Dist. Lodge 751*, 270 NLRB at 1066 (applying framework to alleged refusal to file a grievance because of non-union status); *Consolidated Bus Transit, Inc.*, 350 NLRB at 1065 ("… the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action.").

and Mata's inability to obtain training much less that it demonstrates that gender was a motivating factor in Mata's inability to obtain training.

Mata's claims are questionable in any event. Mata asserted the exact same exchange occurred each time she returned to Local 28 during a five year period, always in Harris' office.[240] This includes during each of the sporadic visits she made to Local 28 during her Iraq employment and during her sporadic visits when she was employed by private trucking companies.[241] Like much of Mata's testimony, she contradicted herself asserting the events occurred only "on some of those occasions."[242] Harris denied it completely.[243]

The General Counsel also implies that Local 28 demonstrated bias by failing to report Mata's complaint to the WGMA under the applicable sexual harassment policy.[244]. Regardless of whether this obligation actually exists, Mata was specifically asked if she wished to have this done.[245] Mata declined.[246]

F. Only the General Counsel's Interpretation Supports a Supposition that Describing Jobs as "Dirty" or "Physical" Evidences Discrimination

Out of 490 pages of transcript, the General Counsel finds only one example of what is perceived to be stereotypical language directed towards Mata by Local 28. That testimony was limited to an alleged comment that certain jobs on the waterfront were "dirty" and "physical."[247]

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[240] Tr. p. 50, l. 2-p. 52, l. 6; Tr. p. 132, l. 3-6; Tr. p. 157, l. 4-19.
[241] Tr. p. 132, l. 7-15.
[242] Tr. p. 100, l. 12.
[243] Tr. p. 340, l. 16-25.
[244] GC Exceptions p. 27, n. 6; Resp. Ex. 22.
[245] Tr. p. 476, l. 4-30; Resp. Ex. 21.
[246] Tr. p. 476, l. 4-30.
[247] GC Brief p. 27.

Mata was asked, "Why do you think Harris wasn't letting you get on the training list, or get training?"[248] Rather than say "because I am a woman" or "because I rejected his advances," Mata answered:

> He would tell me that he didn't want me to get those classes. He told me himself that he didn't want me to do the Forklift, he didn't want me to do the Heavy Lift. He didn't want me to do these kinds of jobs because those are dirty jobs, those are physical jobs, and that's not what he wanted me to do.[249]

Mata was not asked what she thought Harris meant by "dirty;" she was asked what she meant by "dirty."[250] Mata answered, "Dirty jobs where you - - when you do some of those jobs, they are greasy, they're - - there's slime usually, there is mud, so you get dirty on those jobs."[251] Mata continued, "On the equipment or on the cargo or even on the chains and straps, things like that that you are physically carrying around, moving around. When you grab on to them you are going to get dirty."[252] That comprised the full extent of the discussion regarding "dirty" jobs.

It is not even clear from Mata's testimony whether Harris actually used the words "dirty" and "physical" or whether those were Mata's description of the jobs mentioned. As Mata testified, even if Harris did use those words, he was correct, the jobs are "dirty" and "physical." Mata also fails to detail when this conversation allegedly occurred or how many times it allegedly occurred. As the ALJ observed, "Mata was confused about a number of details in her testimony; although she certainly believed these events occurred, she had so many issues that I cannot see clear to credit her fully."[253] The ALJ determined

[248] Tr. p. 43, l. 13-14.
[249] Tr. p. 43, l. 15-20.
[250] Tr. p. 43, l. 21-24.
[251] Tr. p. 43, l. 25-p. 44, l. 2.
[252] Tr. p. 44, l. 5-8.
[253] ALJ Decision p. 13, l. 42-44.

not to credit Mata's testimony that Harris made these comments prior to San Miguel, Jr. taking responsibility for her in July 2016.[254] The General Counsel presents nothing to change this result.

Other than an apparent assumption, the General Counsel offers nothing implying that these alleged comments were gender related or based on gender stereotypes. The jobs were, in fact, dirty and physical. To portray these alleged observations as anything other than a general observation or stray remark requires more than the evidence permits.[255]

G. The General Counsel's Statistical Evidence Argument is Flawed Factually and Legally

The General Counsel makes much of the percentage of casuals working through Local 28; apparently seeking to create a *prima facie* case of gender discrimination under *Wright Line* because Mata was a casual worker[256] Despite the General Counsel citing to testimony allegedly stating this percentage, no such percentage was evidenced.

Local 28 has approximately 970 individuals holding seniority.[257] There are approximately 550 members.[258] One need not be a member to have seniority.[259] The number of casuals fluctuates.[260] The General Counsel made no effort to illicit testimony evidencing the gender percentage of casuals.

The General Counsel did elicit an estimate that 8 to 10 percent of individuals within the total Local 28 workforce are women.[261] This matched an estimate provided

[254] ALJ Decision p. 13, l. 49-51.
[255] *See Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010).
[256] Tr. p. 377, l. 23-p. 378, l. 2.
[257] Tr. p. 318, l. 4-6.
[258] Tr. p. 411, l. 16-19.
[259] Tr. p. 411, l. 20-24.
[260] Tr. p. 318, l. 20-25.
[261] Tr. p. 338, l. 13-22.

concerning the gender breakdown of Local 28 members.[262] The General Counsel made no effort to illicit testimony concerning the breakdown of women obtaining or seeking training through Local 28 in any category.

As the ALJ correctly observed in connection with the General Counsel's apparent assertion that Local 28 discriminates against women generally, "testimony was generalized and does not support a conclusion that the Union discriminates against female workers."[263] In addition, the ALJ analyzed the failure to present "the number of women working through the Union" under the General Counsel's focus on the alleged lack of documentation of training requests.[264] The ALJ correctly observed the lack of evidentiary nexus between training and the number of women within the Local 28 workforce. So, even if the General Counsel's Exception 12 is deemed technically correct, it is not material. It illuminates nothing about casuals, training, or Mata.

The General Counsel apparently assumes that a perceived low percentage of females in a group demonstrates discrimination by that group. Of course, here, the General Counsel fails to evidence the percentage of women among casuals at any time. Although statistics may be used to illustrate a history of discrimination or that a defendant's professed reasons for acting are a pretext for discrimination, it is insufficient to "merely show that one protected group forms a small percentage of" a particular workforce.[265] One must compare the number of minorities selected with the number of qualified minority applicants.[266] One must also compare apples to apples and oranges to

[262] Tr. p. 411, l. 10-15.
[263] ALJ Decision p. 14 (l. 39-41).
[264] ALJ Decision p. 14, (l. 46-48).
[265] *Bolden v. Clinton*, 847 F. Supp. 2d 28, 35 (D.D.C. 2012).
[266] *Id.*; *see Scales v. Slater*, 181 F.3d 703, 708 n.5 (5th Cir. 1999) (statistical disparities in workforce "utterly insufficient to establish disparate impact").

oranges. The General Counsel made no effort to make such comparisons. In fact, given that the percentage of females matches in both Local 28's workforce and membership, it could be just as easily inferred that Local 28 does not discriminate. This demonstrates the fallacy of the General Counsel's argument.

H. Mata was Treated no Differently than any other Individual and her Alleged Inability to Obtain Training Occurred without Regard to Gender or Harris' Alleged Propositions

The second prong of the *Wright Line* test calls on Local 28 to show Mata's inability to obtain training would have occurred regardless of her gender or Harris' alleged propositioning.[267] Even assuming Mata was told she should not perform "dirty" jobs, that she requested training, that Harris propositioned her and was rejected, and the that the statistical claims presented by the General Counsel as evidence were true and had legal impact, there is no evidence, other than Mata's supposition and the General Counsel's belief, that she was denied training due to her gender or because she spurned Harris. In short, there is no evidence that Mata suffered an adverse employment action.

The evidence does show, instead, that when Mata made a timely request for training in June 2015, she obtained the desired training. The evidence also shows that the training referral process utilized by Local 28 throughout was uniform, routine, and reasonable. Under that process, individuals were required to seek inclusion on training lists submitted by Local 28 at the same time and in the same manner each month. This, again, is exactly what occurred in June 2015. The evidence also shows that at least twice Mata's inquiries concerning training occurred outside this process. Mata offers nothing but her unsubstantiated testimony that she sought training repeatedly and timely. Quite

[267] *Consolidated*, 350 NLRB at 1065.

simply, the evidence shows that when Mata made timely inquiry, she obtained training; when she did not, she did not obtain training.

Nothing suggests Mata was treated differently than any other individual. On the contrary, assuming Mata encountered difficulty obtaining training, it derived from her being subject to the same process as everyone else. The General Counsel urges that Mata should have been treated differently. The General Counsel's argument that Mata **should have been** treated differently counters its argument that Mata **was** treated differently. The evidence establishes that Local 28 referred Mata to training appropriately throughout and the only thing that caused any difference in how Mata was dealt with was her June 30, 2016 complaint to Local 28.

VIII.

Conclusion

This case has now been heard twice, each time being determined against Mata. The General Counsel excepts to the latest adverse decision claiming the Administrative Law Judge failed to determine the right case, a general arbitrary violation of fair representation; applied the wrong standard and analysis to the case actually presented, gender discrimination; and failed to credit Mata fully and discredit other witnesses. The General Counsel's exceptions are long on claims but short on evidence. Ultimately, the General Counsel fails to show by the required preponderance of the credible evidence that Local 28 training referral system was arbitrary generally or in relation to Mata and fails to show that Local 28 discriminated against Mata generally, on the basis of her gender, or in retaliation for spurning Tim Harris' alleged propositions. The ALJ properly dismissed

the Complaint presented.[268] The Board should deny each of the General Counsel's Exceptions and uphold the Administrative Law Judge's Order dismissing the Complaint in its entirety.

IX.

Prayer

WHEREFORE, PREMISES CONSIDERED, International Longshoreman's Association Local 28 respectfully requests the National Labor Relations Board deny Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision, affirm the rulings, findings, and conclusions of the Administrative Law Judge, and adopt the Order of the Administrative Law Judge in its entirety. International Longshoreman's Association Local 28 additionally respectfully requests such additional relief to which it may be justly entitled.

[268] GC Exception 5, p. 2. Because Exception 5 is a general exception presented without specific basis, it is not independently addressed. However, as is apparent from the discussion in this Response, the Complaint was properly dismissed.

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of December, 2017, the undersigned attorney affirms under penalty of perjury that he caused a true and correct copy of International Longshoreman's Association Local 28's Response Brief to the Counsel for the General Counsel's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's Decision to be electronically filed using the National Labor Relations Board's website and thereafter served the following by United States First-Class Mail in a postage pre-paid properly addressed envelope at the following addresses designated for such purpose or, as where indicated, via e-mail.

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